Last page of docket

SHDKT PROCEEDINGS AND ORDERS DATE: [05/07/91]

CASE NBR: [90106835] CFY STATUS: [DECIDED]

SHORT TITLE: [Williams, Terrence -]

VERSUS [United States] DATE DOCKETED: [011791]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Jan 17 1991	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Feb 20 1991		Order extending time to file response to petition until March 21, 1991.
5	Mar 21 1991		Brief of respondent United states in opposition filed.
6	Mar 28 1991		DISTRIBUTED. April 12, 1991
8	Apr 15 1991		REDISTRIBUTED. April 19, 1991
10	Apr 22 1991		REDISTRIBUTED. April 26, 1991
12	Apr 29 1991		Petition GRANTED. Judgment VACATED and case REMANDED for further consideration in light of the position presently asserted by the Solicitor General in his brief for the United States filed March 21, 1991. Dissenting opinion filed by Justice Kennedy with whom The Chief Justice and Justice Scalia join. Opinion per curiam.

****

TERRENCE A. WILLIAMS (2)

v.

UNITED STATES OF AMERICA 90-6835

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, TERRENCE A. WILLIAMS, asks leave to file the attached petition for a writ of certiorari without prepayment of cosis and to proceed in forma pauperis. Counsel was appointed for Petitioner under the Criminal Justice Act in the United States District Court for the Northern District of Ohio, Eastern Division, and the United States Court of Appeals for the Sixth Circuit, where he was granted leave to proceed in forma pauperis.

M. Kathryn Croft

M. KATHRYN CROFT
Attorney for Petitioner
500 Society Building
Akron, Ohio 44308
(216) 762-0771

No. 90-5833

IN THE

SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1991

TERRENCE A. WILLIAMS - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT

PETITION FOR WRIT OF CERTIORARI

FOR THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

M. KATHRYN CROFT
Attorney for Petitioner
500 Society Building
Akron, Ohio 44308
(216) 762-0771

QUESTIONS PRESENTED

I. Is there an unconstitutional seizure when an undercover police officer, without probable cause, commands a person to halt and, by pursuit, makes it apparent he is not free to go his way?

II. Should the Court of Appeals have heard de nova the question of probable cause to arrest?

III. Do circumstances which justify a Terry stop provide sufficient grounds for arrest of a suspect for aiding and abetting in a crime committed by his companion during a chase?

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NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

January Term, 1991

TERRENCE A. WILLIAMS, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner, TERRENCE A. WILLIAMS, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit upholding the District Court's refusal to suppress from evidence cocaine found in search of Petitioner's person and statements made by Petitioner subsequent to his unconstitutional arrest made without probable cause.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and appears in Appendix A to this Petition. The unpublished written opinion of the District Court for the Northern District of Ohio,

Eastern Division, appears in Appendix B. The Written opinion of the District Court on Defendant's motion to suppress appears in Appendix C.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on October 19, 1990. This Court's jurisdiction is invoked under Title 28, U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendments IV to the United States Constitution is set forth in Appendix C. 18 U.S.C. [2 is set forth in Appendix E. 21 U.S.C. [841(a)(1) is set forth in Appendix F.

STATEMENT OF THE CASE

The United States District Court, Northern District of Ohio, Eastern Division, had jurisdiction pursuant to Title 18, U.S.C. §3231.

Defendant, Terrence Williams, was indicted May 2, 1990, on a charge of possessing with the intent to distribute 88.63 grams of cocaine base (crack) in violation of 21 U.S.C. §841(a)(1). On May 31, 1989, Defendant filed a Motion to Suppress. The motion was denied after hearing held June 2, 1989.

Defendant was tried before Judge David Dowd in the United States District Court, Northern District of Ohio, Eastern Division, Case No. 1:89 CR 0135, commencing August 1, 1989. A guilty verdict was rendered by the jury on August 2, 1989. He was sentenced to serve one hundred twenty (120) months in prison

pursuant to 21 U.S.C. §841(b)(1)(A) on November 22, 1989.

Notice of Appeal was filed on December 1, 1989. Petitioner argued before the Court of Appeals for the Sixth Circuit that his arrest near the Greyhound Bus Station in Cleveland, Ohio, violated his rights under the Fourth Amendment of the Constitution of the United States; that the search of his person pursuant to the arrest was therefore illegal and the cocaine found in the search should be suppressed; and that statements made by him subsequent to the unconstitutional arrest should be suppressed. Other grounds not argued here were that 21 U.S.C. [841(b)(1)(A) unconstitutionally discriminates against blacks in that there is disparate impact in sentencing, and that Defendant had been held twice in jeopardy.

Oral arguments were heard September 19, 1990. The opinion of the Court of Appeals affirming the decision of the District Court was filed October 19, 1990. The Sixth Circuit found that the command to stop by undercover agents, and the subsequent pursuit by the agents did not constitute an arrest which would have triggered the Fourth Amendment protections, and that totality of the circumstances surrounding Petitioner's arrest raised a reasonable suspicion justifying a Terry stop. Terry v. Ohio, 392 U.S. 1 (1967)

The Court of Appeals found, however, that an actual arrest, not a Terry stop, was made, which required probable cause, not merely reasonable suspicion. The Court followed its prior holding in United States v. Pepple, 707 F.2d 261 (6th Cir. 1983), using the clearly erroneous standard of review of the

finding of probable cause for the arrest. While granting that the existence of probable cause was a "close" question, the Court of Appeals could not say the District Court finding was clearly erroneous. It therefore affirmed the District Court's decision.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons: This Petition presents an issue left unresolved in Michigan v. Chesternut, 486 U.S. 567 (1988); and the opinion below conflicts with decisions of other Circuits.

The United States Constitution, in the Fourth Amendment, guarantees all U. S. citizens they will be free from unreasonable search and seizure. Although this mandates a search warrant in most cases, Coolidge v. New Hampshire, 403 U.S. 443 (1971); Skinner v. Railway Labor Executive's Asso., 489 U.S. ___, 103 L.Ed.2d 639, 109 S.Ct. 1402 (1989), this Court has set out a number of exceptions to the warrant requirement where securing a warrant is impractical, Katz v. United States, 389 U.S. 347 (1967). Among these exceptions are: law enforcement officers arresting a person found committing a crime are permitted to search the person being arrested, Agnello v. United States, 269 U.S. 20 (1925); and "pat downs" in the presence of regulatable facts which reasonably warrant an investigation and a superficial intrusion to protect the investigating officer are also permissible, Terry v. Ohio, supra.

In a number of cases, this Court has considered the question of when arrest or seizure occurs, absent physical restraint.

This Court has held that it is not seizure for officers to approach and question a suspect, Florida v. Royer, 460 U.S. 491 (1983), and that identification by undercover officer of themselves as police officers, without more, does not constitute a seizure, U.S. v. Mendenhall, 446 U.S. 544, 555 (1980). And even without probable cause, following of a Defendant by police in a cruiser is not seizure absent an order to halt. Chesternut, supra.

In Chesternut this Court recognized but did not decide the question of when does a command to halt, with the indication that a person is not free to proceed on his way, constitutes a seizure. Chesternut, supra, at 575-576 n.9. This case presents a clear-cut set of facts on which to make that determination, as the prosecution conceded that the police had no articulable facts to justify even an investigative stop when they identified themselves as police officers. Motivated only by unfounded suspicion, the undercover officers, through pursuit, provoked Defendant's "flight" with which the officers then justified an order to halt. This Court should take the opportunity to clarify the question of the constitutionality of such official conduct.

In considering the case, the Sixth Circuit followed its decision in U.S. v. Pepple, supra, using a "clearly erroneous" standard of review of the District Court's determination of probable cause for the arrest. While the Pepple decision states that it is consistent with decisions of the Ninth Circuit, that does not appear to be the case today.

To determine the proper standard of review of mixed question of law and fact, the Ninth Circuit heard en banc the case of U.S. v. McConney, 728 F.2d 1195 (9th Cir. 1984). The case presented the question of determination of what constituted exigent circumstances, but the Court also discussed the determination of probable cause as constituting a mixed question of law and fact, as well. They determined that all factual determinations by the district court were to be reviewed by the clearly erroneous standard. However, the selection of the law and the application of the law to the facts was to be made de nova. The Ninth Circuit has since heard the question of probable cause de nova in U.S. v. Hoyos, 892 F. 2d 1387 (9th Cir. 1989).

The Seventh Circuit also heard de nova the question of probable cause for arrest, applying the clearly erroneous standard to the facts only in U.S. v. Lima, 819 F.2d 687 (7th Cir. 1987).

This Court, in Ker v. California, 374 U.S. 1623 (1963), held that the findings of a district court are not insulated from review, and that on appeal, the appellate court should hear de nova the determination of whether constitutional rights have been violated.

There are two mixed questions of law and fact in this case: Whether Defendant was seized when the police pursued him after he failed to stop when ordered to do so; and whether a "drug courier profile" is sufficient basis for arrest for aiding and abetting a companion in the commission of a crime during flight.

Under 18 U.S.C. §2, an "aider and abettor" may be charged as

a principal in the crime in which he participates. But to support such a charge requires that the accused play some part in the crime, that he take some action designed to make the crime succeed. Nye & Nissen v. United States, 336 U.S. 613 (1949). Merely being in the presence of one who commits a crime, even knowing that it is being committed, is not sufficient to charge the observer as a principal. Pinkney v. United States, 380 F.2d 882 (5th Cir. 1967), cert. denied, 390 U.S. 908 (1968). To be guilty as an aider and abettor in the crime of possession with the intent to distribute, it is not necessary that the accused have the illegal drugs in his hands. But he must be aware of the crime plan and do something to make the plan succeed. United States v. Garcia-Rosa, 876 F.2d 209 (1st Cir. 1989).

Then, do facts which arguably justify a Terry investigatory stop (the fact that a suspect fit a "drug courier profile", that he was sensitive to surveillance, that he fled upon approach by undercover officers and that he failed to halt when commanded to do so) provide probable cause to believe that an accused is not only aware of a crime plan of his companion, but that he has done something to make that plan succeed?

Justifiable or reasonable suspicion supports a Terry stop. Mere suspicion is not probable cause for arrest as an aider and abettor. U.S. V. Green, 670 F.2d 1148 (D.C. Cir. 1981). This Court should grant certiorari to unequivocally rule on the question of conversion of reasonable suspicion into probable cause for arrest on an aiding and abetting charge as well as to clarify when a defendant is arrested in the context of a command

to pursuit and a command to halt.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

DATED: January 15, 1991.

Respectfully submitted,

M. KATHRYN CROFT
Attorney for Petitioner

NO. 89-4083

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellant,

v.

TERRENCE A. WILLIAMS

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Ohio.

Before: JONES and GUY, Circuit Judges; and PECK, Senior Circuit Judge.

PER CURIAM. Defendant, Terrence Williams, was convicted of possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841(a)(1). Pursuant to the provisions of 21 U.S.C. § 841(b)(1)(A), Williams was sentenced to 120 months imprisonment.

On appeal, Williams raises three issues: (1) lack of probable cause for his arrest and the resultant seizure of the incriminating cocaine base, (2) double jeopardy, and (3) a claim that 21 U.S.C. § 841(b)(a)(A) is unconstitutional in that it denies equal protection of the laws to all citizens. Although we find all of these claims to be lacking in merit, we will discuss them individually. The conviction will be affirmed.

I.

We deal first with the double jeopardy issue since it is easy of resolution. After the first day of trial, the government moved for a continuance because the chemist who was to testify for the government was seriously ill. The motion to continue was granted. Williams then moved for a mistrial and this motion was also granted. When Williams'

second trial was scheduled, a claim of double jeopardy was made and rejected. Williams then appealed, but the second trial continued because the trial judge concluded the appeal was frivolous.[1] This decision was in keeping with the rule in this circuit that a trial court is not divested of jurisdiction when an appeal based on double jeopardy is filed unless the appeal has a "colorable foundation." United States v. Lanci, 669 F.2d 391, 394 (6th Cir.), cert. denied, 457 U.S. 1134 (1982). Here, the mistrial was at the request of the defendant and was requested as a matter of trial strategy. The mistrial motion was not triggered or necessitated by any misconduct on the part of the prosecution. United States v. Jorn, 400 U.S. 470, 485 (1971). We agree with Judge Dowd that the appeal was frivolous.

II.

Defendant's argument that 21 U.S.C. § 841(b)(1)(A) is unconstitutional is not a new one.[2] It has previously been considered and rejected by this court in United States v. Avant, 907 F.2d 623 (6th Cir. 1990), and United States v. Levy, 904 F.2d 1026 (6th Cir. 1990).[3]

Williams attempts to put a spin on the usual arguments made attacking the constitutionality of section 841(b)(1)(A) by arguing it is discriminatory as to poor blacks because they are more likely to possess and distribute crack cocaine than whites. There are three problems with this argument. First, it is raised for the first time on appeal and therefore is not properly before us. Boone Coal & Timber Co. v. Polan, 787 F.2d 1056 (6th Cir. 1986). Second, as a result of being raised for the first time on appeal, defendant

[1] The appeal was subsequently dismissed due to lack of prosecution.

[2] The argument is predicated upon the fact that the mandated punishment for crimes involving cocaine base (crack) is considerably more severe than for crimes involving a comparable amount of cocaine powder.

[3] At least four other circuits have also rejected attacks on the constitutionality of 21 U.S.C. § 841(b)(1)(A). See United States v. Buckner, 894 F.2d 975, 978-980 (8th Cir. 1990); United States v. Colbert, 894 F.2d 373, 374-75 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 2601 (1990); United States v. Cyrus, 890 F.2d 1245, 1248 (D.C. Cir. 1989); United States v. Malone, 886 F.2d 1162, 1166 (9th Cir. 1989).

offers no empirical data to support the proposition that blacks are disproportionately impacted by section 841(b)(1)(A). Third, the mere fact that a criminal penalty provision can be shown to fall more heavily on one identifiable group as opposed to another does not, without more, implicate the equal protection provisions of the Constitution. As we pointed out in both Avant and Levy, Congress responded to the seriousness of the crack cocaine problem, as distinguished from other drug crime problems, by increasing the penalties for offenses involving crack cocaine. This was a legitimate exercise of legislative discretion and no argument is made that the legislation was aimed at blacks, the poor, or any other discrete group. We pass no judgment on whether some type of "disparate impact" argument might be constructed based upon a proper record since we have no record at all on this issue in this case.

III.

In order to put defendant's "lack of probable cause for arrest" argument in proper perspective, it is necessary to limn the factual backdrop against which the legal arguments must be considered.

On April 17, 1989, two Cleveland detectives, working undercover, were surveilling the Cleveland Greyhound bus station. They were awaiting the arrival of a bus from Detroit, Michigan, a city considered to be a source city for narcotics coming into the Cleveland area. The defendant and another black male got off the bus with no luggage and were not met by friends or family. The two detectives decided to approach the two youths who began to walk away. The defendant and his companion became aware that they were being approached and broke into a run. The detectives yelled, "Stop. Police[,]" and gave chase. The person other than the defendant who was fleeing took a plastic bag out of his pocket, which appeared to contain crack cocaine, and tore it open with his teeth in an effort to dissipate the contents. The two suspects separated as they ran and only the defendant was overtaken. He was arrested and given his Miranda rights. In a search at the police station subsequent to arrest, he was found to be

carrying 88.63 grams of cocaine base (crack). After the crack was found, defendant freely admitted he had come from Detroit to Cleveland to sell the crack and had done so before.

From these facts defendant argues that he was "seized" within the meaning of the fourth amendment without probable cause or even reasonable suspicion, that he was arrested without probable cause, and that since both his seizure and arrest were tainted, any subsequent evidence discovered or statements made must be suppressed.[4]

We have had occasion recently to address the nature of police-citizen contacts, such as are involved here. In United States v. Flowers, we stated:

> [I]t is clear that there are three distinct types of contact that occur between police officers and the travelling public. The first is contact initiated by a police officer without any articulable reason whatsoever. This contact and its consequences are referenced in Florida v. Royer, 460 U.S. 491, 497 (1983), as follows:
>
> > [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. See Dunaway v. New York, supra, at 210, n. 12; Terry v. Ohio, 392 U.S. at 31, 32-33 (Harlan, J., concurring); id. at 34 (WHITE, J., concurring). Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. United States v. Mendenhall, 446 U.S. 544, 555 (1980) (opinion of Stewart, J.).
>
> See also United States v. Collis, 699 F.2d 832, 834-35 (6th Cir.), cert. denied, 462 U.S. 1119 (1983).
>
> The second type of contact is that predicated upon "reasonable suspicion"--the classic Terry stop. The temporary detention of a person meeting the drug courier profile would be an example of this type of police-citizen contact which, although constituting a seizure, would not offend the fourth amendment.
>
> The third type ... is when the officers have probable cause to believe a crime has been committed and that the person stopped committed it. In such situations the seizure may, in fact, be an arrest.

[4] Defendant filed a timely suppression motion prior to trial which was denied.

909 F.2d 145, 147 (6th Cir. 1990) (footnote omitted). Consistent with the above analysis, the detectives described their standard operating procedure as follows:

> THE WITNESS: It's enough to maybe go up and ask the male some questions. And that's what we do at times is go up and identify ourselves and tell them exactly what we're doing, investigating drug trafficking through the Greyhound and ask them if they mind answering questions.
>
> If they say no, they go. And if they cooperate, they cooperate.

(6-2-89 Suppression Hrng. Tr. at p. 41). The detectives never got an opportunity to complete a "first level" encounter, however, since the defendant and his companion fled. This interjects an element we did not have to consider in Flowers. Defendant argues that the command "stop," coupled with the chase, amounted to a seizure that was without probable cause or reasonable suspicion. We need not consider the probable cause or reasonable suspicion issue because we conclude that the command to stop the subsequent chase did not amount to a seizure implicating fourth amendment protections. The Supreme Court considered this issue very recently in Michigan v. Chesternut, 486 U.S. 567 (1988). Unfortunately, although on point, this decision left the waters still murky on this issue. Chesternut was an appeal from a Michigan Court of Appeals decision that had held that the federal Constitution mandates that all "investigatory pursuit" is a seizure. 157 Mich. App. at 183. The Supreme Court reversed and held that bright line rules were inappropriate and "that any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account "all the circumstances surrounding the incident" in each individual case. Chesternut, 486 U.S. at 572, quoting INS v. Delgado, 466 U.S. 210, 215 (1984), quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.). Two other points must be made relative to Chesternut. Justice Kennedy filed a concurrence joined by Justice Scalia. Justice Kennedy stated:

> We would do well to add that, barring the need to inquire about hot pursuit, which is not at issue here neither "chase" nor "investigative pursuit" need be included in the lexicon of the Fourth Amendment.

> A Fourth Amendment seizure occurs when an individual remains in the control of law enforcement officials because he reasonably believes, on the basis of their conduct toward him, that he is not free to go. See, e.g., INS v. Delgado, 466 U.S. 210, 215 (1984); United States v. Mendenhall, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.).

486 U.S. at 576-77. The Kennedy concurrence concluded with the following:

> The case before us presented an opportunity to consider whether even an unmistakable show of authority can result in the seizure of a person who attempts to elude apprehension and who discloses contraband or other incriminating evidence before he is ultimately detained. It is at least plausible to say that whether or not the officers' conduct communicates to a person a reasonable belief that they intend to apprehend him, such conduct does not implicate Fourth Amendment protections until it achieves a restraining effect. The Court's opinion does not foreclose this holding, and I concur.

Id. at 577.

Justices Kennedy and Scalia clearly appear to be suggesting that a police chase does not result in a seizure until the suspect is caught. Although there is no specific reaction to this suggestion by the other members of the Court, we note that the principal opinion states in footnote 9:

> The United States, which has submitted a brief as amicus curiae, suggests that, in some circumstances, police pursuit "will amount to a stop from the outset or from an early point in the chase, if the police command the person to halt and indicate that he is not free to go." Brief for United States as Amicus Curiae 13. Of course, such circumstances are not before us in this case. We therefore leave to another day the determination of the circumstances in which police pursuit could amount to a seizure under the Fourth Amendment.

486 U.S. at 575-576 n.9.[5]

Not unlike the Supreme Court in Chesternut, we elect to decide only the case before us. We conclude that under the circumstances here, if a seizure did occur during the pursuit stage of this encounter, it did not offend the fourth amendment. The police

[5] Brower v. Inyo, 489 U.S. 593 (1989), was decided subsequent to Chesternut. The opinion written by Justice Scalia, and concurred in by a majority of the Court, arguably has written another chapter on this question. Brower involved a police roadblock which not only stopped but also killed a fleeing stolen car driver. In the course of concluding that this stop was a fourth amendment seizure, the opinion quite clearly indicates that anything short of intentional acquisition of physical control is not a seizure. In fact, Justices Stevens, Brennan, Marshall, and Blackmun, although concurring in the result, write separately to disassociate themselves from this proposition which they label "dicta."

knew from past experience that Detroit was a source city and that drug couriers frequently travelled by bus between Detroit and Cleveland. They further knew that the couriers, more often than not, were young black males who arrived without luggage and were not met by anyone. This, coupled with the fact that the defendant and his companion were alert to surveillance and immediately fled when plainclothes officers approached,[6] provided sufficient reasonable suspicion to make a Terry stop.[7] Since a Terry stop allows for a temporary seizure of the person, we need not consider the implication of the command to stop and the subsequent pursuit.[8]

The problem here is that, upon catching up with the defendant, the officer did not complete a Terry stop but, rather, made an arrest which requires probable cause, not the more lenient reasonable suspicion predicate.

The district judge resolved the probable cause issue as follows:

> The Court finds that the detectives had probable cause for the arrest of the defendant at the time he was apprehended at the intersection of Chester and 17th. The Court finds that probable cause existed for the arrest based upon the fact that Detective Zaller and his partner had observed the males fitting the Detroit to Cleveland drug courier profile, coupled with flight upon notice, and coupled with the undisputed fact that Detective Zaller witnessed the traveling companion attempting to destroy cocaine base crack -- a commission of a crime in his presence.

(Dist. Ct. Order of June 13, 1989, at 10 (App. 29)). We have previously held that "[t]he district court's determination that probable cause existed to ... arrest ... must be accepted unless it is clearly erroneous." United States v. Pepple, 707 F.2d 261, 263 (6th Cir. 1983) (citations omitted). Although we view the issue as a close one, we cannot say the conclusion of the district court was clearly erroneous. Since the arrest was proper,

[6] In United States v. Pope, 561 F.2d 663 (6th Cir. 1977), we concluded that flight is an appropriate element to consider in the "reasonable suspicion" calculus.

[7] Terry v. Ohio, 392 U.S. 1 (1968).

[8] We note in passing that, in Chesternut, Justice Kennedy said that "respondent's unprovoked flight gave the police ample cause to stop him." 486 U.S. at 576.

defendant's subsequent search and his incriminating admission after Miranda warnings were properly admissible.

AFFIRMED.

A TRUE COPY
Attest:
LEONARD GREEN, Clerk
By _____
Deputy Clerk

ISSUED AS MANDATE: November 13, 1990
COSTS: None

AO 245 S (3/88) Sheet 1 - Judgment Inc Sentence Under the Sentencing Reform Act

ct NOV 24 1989
Ron Bakeman
Christopher Stanley
Defendant
U.S. Marshal
Probation
PT Services

United States District Court

FILED
1989 NOV 22 PM 3:46

NORTHERN District of OHIO

UNITED STATES OF AMERICA
V.
TERRANCE A. WILLIAMS

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number 1:89CR135

(Name of Defendant)

Christopher Stanley
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.
☒ was found guilty on count(s) I after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 §841(a)(1) and (b)(1)(A) U.S.C.		I

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☒ It is ordered that the defendant shall pay to the United States a special assessment of $ 50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

November 22, 1989
Date of Imposition of Sentence

Defendant's mailing address:

Signature of Judicial Officer

David D. Dowd, Jr. U.S. District Judge
Name & Title of Judicial Officer

Defendant's residence address:

Date

Defendant: Terrance A. Williams
Case Number: 1:89CR135

Judgment—Page 2 of 4

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 120 months with credit for time already served since April 17, 1989.

☒ The Court makes the following recommendations to the Bureau of Prisons:

The Federal Correctional Institution in Milan, Michigan

☐ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district,

☐ at _____ a.m. / p.m. on _____ .

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Judgment—Page 3 of 4

Defendant: Terrance A. Williams
Case Number: 1:89CR135

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of _____

five (5) years

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

Defendant: Terrance A. Williams
Case Number: 1:89CR135

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;
2) the defendant shall not leave the judicial district (or other specified geographic area) without the permission of the court or probation officer;
3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5) the defendant shall support his or her dependents and meet other family responsibilities;
6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;
10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
15) the defendant shall not possess firearms, ammunition, explosives, destructive devices, or other dangerous weapons.

THESE CONDITIONS ARE IN ADDITION TO ANY OTHER CONDITIONS IMPOSED BY THIS JUDGMENT.

Ron Bakeman
Christopher Stanley
Defendant
U.S. Marshal
Probation
PT Services

FILED
89 DEC -1

UNITED STATES DISTRICT COURT

NORTHERN District of OHIO

EASTERN DIVISION

UNITED STATES OF AMERICA
V.
TERRANCE ALLEN WILLIAMS
Defendant

MEMORANDUM OF SENTENCING HEARING AND REPORT OF STATEMENT OF REASONS

Criminal No. 1:89CR00135-001

Counsel and the defendant were present for sentencing hearing on November 22, 1989. The matters set forth were reviewed and considered. The reasons for sentence, 18 U.S.C. 3553(c), as set forth herein, were stated in open court.

1. Was the presentence investigation report (PSI) reviewed by counsel and defendant? ☒ Yes ☐ No
2. (a) Was information withheld pursuant to FRCrP 32(c)(3)(A)? ☐ Yes ☒ No
   (b) If yes, has summary been provided by the court pursuant to FRCrP 32(c)(3)(B)? ☐ Yes ☐ No
3. (a) Were all factual statements contained in the PSI adopted without objection? ☐ Yes ☒ No

   If no, the PSI was adopted in part with the exception of the following factual issues in dispute:

The defendant objected to an addition of two levels for obstruction of justice. The Court sustained the objection.

(A copy of the adopted portions of the PSI should be attached and made part of the public record.)

SEE APPENDIX A ATTACHED

(b) Disputed issues have been resolved as follows after ☐ evidentiary hearing, ☐ further submissions and/or ☐ arguments:

NOTE: Several of these questions can be addressed by attaching a partial transcript of the sentencing hearing or

4. Are any legal issues in dispute? ☐ Yes ☐ No

If yes, describe disputed issues and their resolution:

5. (a) Is there any dispute as to guideline applications (such as offense level, criminal history category, fine or restitution) as stated in the PSI? ☒ Yes ☐ No

If yes, describe disputed areas and their resolution:

See 3(a)

(b) Tentative findings as to applicable guidelines are:

Total Offense Level: 32

Criminal History Category: I

121 to 151 months imprisonment (mandatory minimum 10 years)

_____ to 5 years supervised release

$_____ to $_____ fine (plus $_____ cost of imprisonment/supervision)

$_____ restitution

$50.00 special assessment ($50.00 on each of counts _____)

6. (a) Are there any legal objections to the tentative findings? ☐ Yes ☒ No

(b) If no, the findings are adopted by the Court.

(c) If yes, describe objections and how they were addressed:

7. Check appropriate space:

X Remarks by counsel for defendant. (The order of argument and/or recommendations and allocution may be altered in accord with the Court's practice.)

X Defendant speaks on own behalf.

X Remarks by counsel for Government.

8. The sentence will be imposed in accordance with prescribed forms in Bench Book Sec. 5.02 as follows:

120 months imprisonment

_____ months/intermittent community confinement

_____ months probation

_____ months supervised release

$ N/A fine (including cost of imprisonment/supervision)

$ N/A restitution

$50.00 special assessment ($50.00 on each of counts #1)

Other provisions of sentence (Community service, forfeiture, etc.):

9. Check appropriate space:

(a) _____ The sentence is within the guideline range and that range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by application of the guidelines.

OR _____ The sentence is within the guideline range and that range exceeds 24 months, and the reasons for imposing the selected sentence are:

(b) X Sentence departs from the guideline range as a result of

☐ substantial cooperation upon motion of the government

OR

☒ a finding that the following (aggravating or mitigating) circumstance exists that is of a kind or degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described by the guidelines for the following reasons:

See attached order

(c) **Is restitution** applicable in this case? ☐ Yes ☒ No

Is full restitution imposed? ☐ Yes ☒ No

If no, less than full restitution is imposed for the following reasons:

(d) Is a **fine** applicable in this case? ☐ Yes ☒ No

Is the fine within the guidelines imposed? ☐ Yes ☐ No

If no, the fine is not within guidelines or no fine is imposed for the following reasons:

_X_ Defendant is not able, and even with the use of a reasonable installment schedule is not likely to become able, to pay all or part of the required fine; or

_____ Imposition of a fine would unduly burden the defendant's dependents; or

_____ Other reasons as follows:

10. Was a **plea agreement** submitted in this case? ☐ Yes ☒ No

Check appropriate space:

_____ The Court has accepted a Rule 11(e)(1)(A) charge agreement because it is satisfied that the agreement adequately reflects the seriousness of the actual offense behavior and accepting the plea agreement will not undermine the statutory purposes of sentencing.

_____ The Court has accepted either a Rule 11(e)(1)(B) sentence recommendation or a Rule 11(e)(1)(C) sentence agreement that is within the applicable guideline range.

_____ The Court has accepted either a Rule 11(e)(1)(B) sentence recommendation or a Rule 11 (e)(1)(C) sentence agreement that departs from the applicable guideline range because the Court is satisfied that such a departure is authorized by 18 U.S.C. 3553(b).

11. Suggestions for guideline revisions resulting from this case are submitted by an attachment to this report. ☐ Yes ☒ No

12. The PSI is to be maintained by the U.S. Probation Office under seal. Those sections adopted and incorporated as part of this statement of reasons will be part of the public record.

13. The Clerk shall prepare the judgment.

14. The Clerk will provide this Memorandum of Sentencing Hearing and Report of Statement of Reasons to the U.S. Probation Department for forwarding to the Sentencing Commission, and if the above sentence includes a term of imprisonment, to the Bureau of Prisons.

11/3-1989
Date

UNITED STATES DISTRICT JUDGE

RE: Williams, Terrance Allen

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. On August 2, 1989, the defendant was found guilty in a trial by Jury to a one-count Indictment which charges as follows:

2. On April 17, 1989, Terrance A. Williams, did possess with intent to distribute approximately 88.63 grams of a mixture containing a detectable amount of cocaine base (crack), a Schedule II Narcotic Drug Controlled Substance, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A).

3. Since this offense took place after November 1, 1987, the Sentencing Reform Act of 1987 is applicable.

Related Cases

4. None

The Offense Conduct

5. The following information was provided by Assistant U.S. Attorney Ronald B. Bakeman.

6. On or about April 19, 1989, the defendant, Terrance A. Williams, and another (unknown to Grand Jury) boarded a bus in Detroit, Michigan. In the defendant's possession was 88.63 grams of cocaine base (crack). It was the defendant's intent to travel to Cleveland, Ohio, and to distribute the cocaine base (crack) in the Cleveland Public Housing projects.

7. Subsequent to arrival in the Cleveland, Ohio area, officers of the Cleveland Police Department attempted to question the defendant. Police ordered the defendant to stop, whereupon he attempted to flee. When caught and taken to the police station, the defendant struggled with police who attempted to remove cocaine base (crack) from his pants.

8. Incident to the defendant's arrest, police found money order receipts on his person, reflecting money was sent from Cleveland to Detroit. The government believes the money sent to Detroit was from the sale of cocaine base (crack).

APPENDIX A

RE: Williams, Terrance Allen

9. According to the government, when questioned by police, the defendant admitted making a previous trip to Cleveland in order to sell cocaine base (crack).

Adjustment for Obstruction of Justice

10. Based upon the defendant's attempts to elude police and his struggle with police when they attempted to search him, incident to arrest, it would appear the defendant obstructed justice.

Adjustment for Acceptance of Responsibility

11. When questioned by the investigating probation officer concerning his involvement in the instant offense, the defendant advised that he was acting as a courier for an individual named Joe (last name unknown), who he knew from his area of residence in Detroit. The defendant further advised that Joe was going to pay him $500 to carry the cocaine base (crack) to Cleveland for delivery. The defendant states, that he had made one trip previously for Joe and was paid $400.

12. The defendant further advised that he was accompanied by Joe from Detroit to Cleveland. On the occasion of the first trip to Cleveland, the defendant states Joe and he met another unknown male to whom, at Joe's direction, he gave the cocaine base (crack). At this point, Joe went with the unknown male and he returned to Detroit on the next bus.

13. When questioned by the investigating probation officer concerning the two money order receipts found in his possession, the defendant advised he was given same by Joe to hold, along with the cocaine base (crack) found in his possession at the time of arrest. The money order receipts reflect that $1,558 was sent by wire to Detroit, Michigan.

Offense Level Computation

14. Base Offense Level: The base offense level for a violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) is found in section 2D1.1 of the guidelines - Unlawful Manufacturing, Importing, or Trafficking, (Including Possession with Intent to Commit these offenses). The defendant possessed with intent to distribute 88.63 grams of cocaine base (crack). According to the drug quantity table, 50 grams but less than 150 grams of cocaine base (crack) has a base offense level of 32. 32

Copies picked up by counsel in Cleveland 6/13/89 JH

cc: Here

DOWD, J.

FILED

1989 JUN 13 PM 8 54

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

UNITED STATES OF AMERICA Plaintiff,	)	CASE NO. 1:89CR0135
vs.	)	
TERRANCE A. WILLIAMS	)	O R D E R
Defendant.	)	

The defendant in the above captioned case has moved to suppress the evidence seized from him as a result of his arrest on April 17, 1989. The defendant also moves to dismiss any statements made by him as a result of his arrest. The Government has opposed the defendant's motion. The Court conducted a hearing on the motion on June 2, 1989, with counsel for the defendant and counsel for the Government participating. For the reasons that appear below, the defendant's motion to suppress the evidence and the statements made by him in connection with his arrest is denied.

At the hearing on the motion, Detective Daniel A. Zaller testified as to the facts giving rise to the defendant's arrest. Officer Daniel A. Zaller and his partner Detective Thomas Parkinson are special deputized United States Marshals assigned to the street gang task

force in Cleveland, Ohio. Detective Zaller and Parkinson are employed by the Cleveland Police.

On April 17, 1989, the officers conducted a surveillance of the incoming Greyhound bus from Detroit at the Cleveland bus station. At approximately 8:25 p.m., the detectives observed the arrival of the 8:15 p.m. Greyhound bus from Detroit, Michigan. Detective Zaller testified that approximately twenty to thirty people disembarked from the Greyhound bus including the defendant and two other young black males.

Detective Zaller testified that he and his partner Parkinson focused on the three young black males departing from the bus given their experience with the trafficking of crack cocaine from the Detroit area into the Cleveland, Ohio area. Their experience provided them with a what is commonly referred to as a "profile" of a Detroit to Cleveland drug courier. Based upon Detective Zaller's personal experience with the investigation and arrest of drug couriers, Detective Zaller has developed a list of identifying factors consistently present in the business of drug trafficking. Drug couriers carrying crack cocaine from the Detroit area are primarily young, middle teens to early, middle twenties, and black. Detroit drug couriers often use the Greyhound bus service between Detroit and Cleveland. The couriers arrive primarily on the last three bus arrivals in Cleveland, on either the 8:15 p.m., the 11:15 p.m., or

the 1:45 a.m. buses. Rarely are couriers met by any readily identifiable family members or familiar acquaintances. Rather, couriers are either met outside the bus terminal by a waiting automobile or a waiting taxi cab. Couriers do not ordinarily carry any luggage or carry-on baggage.

Detective Zaller testified that the factors initiating the focus upon the three young black males in this case included: (1) that they were young and black; (2) that they were not greeted by any apparent friends or family members; (3) that except for one young black male who carried a small gym bag type carry on piece of luggage, the two others, including the defendant, were not carrying any luggage; and (4) the bus they arrived on was one of the three latest arrivals to Cleveland, Ohio from Detroit, Michigan.

After focusing their attention on the defendant and the two other young black males, the detectives observed the three young males exit the bus terminal and separate. The one black male carrying the small gym bag proceeded on foot westbound on Chester Avenue. The two remaining black males, including the defendant, turned eastbound on Chester and stopped to apparently speak with unidentified individuals seated in a car parked outside of the bus station. The officers continued their surveillance of the two males heading eastbound on Chester and decided not to pursue the one individual heading westbound on Chester. The westbound male was not see again in reference to this incident.

Detective Zaller testified that the two black males

stopped briefly at a car and once noticing the police officers turned to continue eastbound on Chester. The officers followed behind. Detective Zaller testified that the two young black males continually looked over their shoulder at the officers. The officers continued on their walking pace pursuit of the two black males. Shortly afterward, the two black males broke into a run from the officers. Simultaneously, the officers shouted at the individuals to stop and identified themselves as police officers.

The two males did not yield to the officers' request to stop and instead quickened their pace separating from each other and proceeding on either side of the street. Detective Parkinson pursued the defendant's traveling companion on the one side of the street, while Detective Zaller pursued the defendant on the other side. During the pursuit of the two individuals, Detective Zaller testified that he observed the second black male, the defendant's traveling companion, take out of his pocket a plastic bag knotted at the top which appeared to contain cocaine crack. He observed the traveling companion swing the bag into his mouth and rip the plastic knotted top portion with his teeth. Detective Zaller's pursuit of the defendant continued until he was able to apprehend and arrest the defendant Williams at the intersection of 17th and Chester. After securing the defendant Williams with handcuffs and placing him under arrest, Detective Zaller surveyed the area

and learned that his partner Detective Parkinson was unable to apprehend the traveling companion who had apparently swung a cocaine filled bag into his mouth.

The defendant was then taken to the Narcotics Division at the Cleveland Police Station. During an interview with the detectives informed him that they were going to search him. At that point, the defendant rose from his chair, turned and attempted to withdraw a plastic bag of cocaine crack from the inside of his trousers. The defendant was handcuffed to the chair by means of one wrist. Consequently, the defendant was able to stand and withdraw the package from his trousers with his other free hand. Detective Zaller witnessed the defendant's withdrawal of the package as he returned to the interview room.

Thereafter, the defendant made voluntary statements to the detectives without the assistance of counsel.

The defendant is charged with knowingly and intentionally possessing 88.63 grams of cocaine base, crack, with the intent to distribute in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A).

In support of his motion to suppress, the defendant argues that at the detectives made a Terry type stop time when they announced that they were police officers and requested the two men to stop. The defendant argues that at that point in time, the officers did not have sufficient articulable facts that would provide the officers with a reasonable suspicion that the males were engaged in

criminal activity. Accordingly, the defendant argues that anything that the officers did after that period must be suppressed as fruits of the poisonous tree.

Initially, the Government argues that the defendant has no standing to challenge the means in which the cocaine was obtained because any property interest the defendant had in the cocaine was abandoned as a result of his attempt to discard it in the interview room. The Court finds, however, the defendant clearly had an interest in the materials contained in his trousers at the time of the search, and that there was no abandonment as claimed by the government. Accordingly, the Court finds that for purposes of this motion the defendant has standing to challenge the evidence seized from him during the search of his person.

On the merits of the motion, the Government concedes that at the time the officers requested the defendant and his traveling companion to stop the detectives did not have sufficient basis for a Terry stop. However, the Government argues that on the strength of the flight of the defendant and his traveling companion, the detectives were then provided reasonable suspicion to make a Terry type stop. In pursuit of that Terry type stop, the Government contends, the detectives witnessed the commission of a crime in their presence. The Government relies on Detective Zaller's testimony that defendant's traveling companion was carrying cocaine and attempted to destroy that evidence by inserting it in his mouth as a basis for probable cause to arrest the

defendant. The Government argues that at that point, i.e., during the chase, the defendant was at minimum aiding and abbetting drug trafficking. Consequently, the Government argues that the officers had probable cause to arrest once the defendant was apprehended as opposed to a Terry stop. The government concludes therefore, that the search at the police station was a permissible search incident to a lawful arrest.

If the defendant's argument is accepted, then the Court's analysis is brief. The defendant argues that at the time the officers announced that they were officers and requested the individuals to stop, a Terry type stop resulted. The defendant argues that the profile alone did not provide the officers with a reasonable suspicion that criminal activity had occurred in their presence and therefore there was no basis for a Terry type stop. Accordingly, the defendant asserts that everything that happened afterwards is suppressable. The Court declines to endorse defendant's characterization of the officers' announcement to halt as a Terry stop. The Court is of the view that at that point when the officers announced that they were officers and the defendant should stop the officers were attempting to make a Terry type stop. However, the officers did not succeed in that endeavor and the announcement alone or the request alone in the Court's view does not amount to a Terry stop.

The next question that the Court must consider is

whether the fact that the two young males began to run and the undisputed fact that the officers observed the traveling companion insert what appeared to be cocaine into his mouth established probable cause for an arrest of the defendant.

In support of the its position, the government relies on United States v. Pope, 561 F.2d 663 (6th Cir. 1977). The defendant also encourages the Court to examine Pope.

In Pope, agents observed the defendant at an airport and based their surveillance on the fact that the defendant appeared to fit a drug trafficking profile in addition to other facts known to the agents. In that case, the defendant recognized the fact that the agents were surveilling him and fled despite the agents' request to stop and the display of identification. The defendant was ultimately apprehended after a chase and arrested. The court in Pope recognized that the agents were attempting to make a Terry stop when they approached the defendant. The court found that

> [t]his intention was thwarted, however, by Appellant's flight at the moment the agent displayed his credentials. If the agent had actually succeeded in effecting an investigative stop at detaining Appellant for questioning at the time of the initial intrusion, the stop would have been invalid because of facts then known to the agent did not amount to "reasonable suspicion" that Appellant was involved in criminal activity.

United States v. Pope, 561 F.2d at 668 (citation omitted).

The court continued in its analysis and found that the "Appellant's flight in the face of a clear showing of lawful authority supplied the agents with grounds to reasonably

suspect the Appellant was engaged in criminal activity." Id. Consequently, the agents could permissibly pursue the defendant for the purpose of making a Terry stop. During the course of the chase the defendant threw his brief case at the agent. The Sixth Circuit found that the Appellant's conduct during the flight was sufficient to provide the agents with probable cause to make an arrest of the defendant for assaulting a federal officer.

The government argues that the facts of this case are analogous to the facts of Pope. First, the government concedes that in this case had the Terry stop been effective at the time the officers announced their identities and requested the defendant to stop there would have been no basis for a legitimate Terry stop. However, consistent with Pope, the government contends that the flight of the young males provided reasonable suspicion to make a Terry stop. Finally, the government argues that Detective Zaller's observation of the traveling companion's attempt to destroy the cocaine provided the officers with probable cause to make an arrest of the defendant for aiding and abetting drug trafficking.

A warrantless arrest must be supported by probable cause to believe that a person has committed a crime or is in the process of committing a crime. Beck v. Ohio, 379 U.S. 89, 91 (1964); United States v. Watson, 423 U.S. 411, 418 (1976). "[P]robable cause requires only a probability or substantial chance of criminal activity." Illinois v.

Gates, 462 U.S. 213, 244 n.13 (1983). The question of whether an arrest is constitutionally sufficient depends on

> whether, at the moment the arrest was made, the officers had probable cause to make it--whether at that moment the facts and circumstances within their knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent man in believing that the [person] had committed or was committing an offense.

Beck, 379 U.S. at 91. Probable cause may be based upon the personal observations of an officer and his experience and training as a law enforcement agent. United States v. Cortez, 449 U.S. 411 (1980).

The Court finds that the detectives had probable cause for the arrest of the defendant at the time he was apprehended at the intersection of Chester and 17th. The Court finds that probable cause existed for the arrest based upon the fact that Detective Zaller and his partner had observed the males fitting the Detroit to Cleveland drug courier profile, coupled with flight upon notice, and coupled with the undisputed fact that Detective Zaller witnessed the traveling companion attempting to destroy cocaine base crack -- a commission of a crime in his presence.

The Court recognizes the government's concession that had the detectives been successful in making a Terry stop initially that such a stop would have been unlawful. However, the Court agrees with the government and finds that the flight in response to the request provided the detectives with reasonable suspicion to make a Terry stop.

While flight itself is not always sufficient to establish suspicion or probable cause, it is significant in the context of the entire activity at the time. See e.g., United States v. Lima, 819 F.2d 687, 689 (7th Cir. 1987). Further, the Court finds that as in Pope, that detectives pursuit of Terry type stop rippened into probable cause to make a warrantless arrest when the officers witnessed the traveling companion's attempt to destroy the cocaine.

In making this determination the Court has carefully evaluated the testimony of Detective Zaller. Based upon the Court's observation of Detective Zaller , the Court finds his testimony to be credible and trustworthy. Detective Zaller demonstrated a strong grasp of the facts giving rise to the arrest of the defendant without contradiction. Further, it is clear to the Court that Detective Zaller is an experienced law enforcement agent in the area of narcotics and drug trafficking.

The Court recognizes that the defendant's traveling companion was not apprehended and that there is no concrete proof that the traveling companion was attempting to destroy cocaine when he swung the plastic bag into his mouth during the chase. However, given the other facts known to the officers at the time, and on the strength of Detective Zaller's testimony, the Court finds that the detectives had a reasonable basis to conclude that the defendant was in engaged in a commission of a crime.

Finally, the Court finds that the resulting search at the police station, therefore, was one that was incident to a lawful arrest. See, New York v. Belton, 453 U.S. 454, 461 (1980). The search was conducted within a short time after the arrest and thus within a reasonable amount of time from the arrest. Moreover, the Court finds that statements made by the defendant incident to his arrest are not suppressable as fruits of the poisonous trees as claimed by the defendant. The statements were made incident to a lawful arrest, and there is no claim by the defendant that the statements were made involuntarily or in violation of Miranda v. Arizona, 384 U.S. 436 (1966).

For the reasons that appear above, the defendant's motion to suppress is denied.

IT IS SO ORDERED.

David D. Dowd, Jr.
U. S. District Judge

was found to be located in the front of Williams pants seems to me to be more than enough standing based on the affidavit of the agent that it was taken from my client.

THE COURT: Do you have a copy of that?

MR. STANLEY: Yes.

THE COURT: Well, I think in order just to get the matter rolling the Court will take the document you've supplied me, which is styled warrant for arrest on the first page, second page is criminal complaint, and the third and fourth page constitutes the affidavit of Daniel Zaller -- I'm going to have that marked as Court's Exhibit 1 and then it will be in the record and then we'll give you your copy back.

MR. STANLEY: Thank you, Judge.

MR. BAKEMAN: Your Honor, I know Mr. Stanley isn't intending on playing games with the words but we're not denying the fact that the cocaine was observed to be removed from the defendant's front area of his pants and thrown to the floor. The government contention nevertheless is the issue of abandonment that the government addressed in the Government's response to the defendant's motion.

THE COURT: I'll hear testimony. I'm not going to rule based on paperwork.

MR. BAKEMAN: Your Honor, I have a copy.

THE COURT: That's alright, just so we've

got a record.

MR. BAKEMAN: Your Honor, at this time the government calls Detective Daniel Zaller to the witness stand.

THE COURT: Very well.

D A N I E L Z A L L E R,

witness for Government, sworn by the Court.

MR. STANLEY: Judge, I'd like to ask for a separation of witnesses.

MR. BAKEMAN: He's going to be my only witness, your Honor.

THE COURT: Very well. The Court will order a separation of witnesses, however.

MR. STANLEY: Is this the other detective?

MR. BAKEMAN: Yeah.

MR. STANLEY: Judge, I intend to call the other detective. I have not subpoenaed him. I had talked to Mr. Bakeman about he was bringing both officers. I assumed he was putting them both on. If necessary, I'll go to the Clerk's Office and get a subpoena and issue it to him now.

THE COURT: Would you just step out.

MR. BAKEMAN: Your Honor, Mr. Stanley is correct, and I told him I'd have both officers here. The government does not intend to call the second police officer,

but nevertheless the Government's entitled to have an officer here sitting at the trial table assisting with the other witnesses.

THE COURT: Do you want to go first and put him on?

MR. STANLEY: No.

THE COURT: You can get your separation that way.

MR. STANLEY: No, your Honor. I'm not going to be tested. That's fine if he wants to.

THE COURT: Proceed.

DIRECT EXAMINATION

BY MR. BAKEMAN:

Q. Sir, would you please state your full name for the record please.

A. Detective Daniel Zaller, Z-a-l-l-e-r.

Q. Are you presently employed?

A. Yes, I am.

Q. And how are you so employed?

A. I work for the City of Cleveland Police Department.

Q. And how long have you been a Cleveland police officer?

A. Since August of 1981.

Q. And prior to your assignment to the Street Gang Task Force what was your assignment with the Cleveland Police Department?

A. I was assigned to the narcotic unit.
Q. And how long had you been assigned to the narcotic unit?
A. I have been in the narcotic unit two years.
Q. Now, prior to your assignment with the narcotics unit can you briefly describe to the Court and counsel your training and background as a police officer?
A. I was assigned Sixth District as a basic patrolman and also worked in the Sixth district Strike Force. I have received training through the Cleveland Police Academy, the Ohio Peace Officer Training Academy in London, Ohio.

I have also attended courses given by the Justice Department, Drug Enforcement Agency, as far as drug recognition, and other courses.

Q. Now, in this particular case we're dealing with the drug of crack and I'll direct my attention strictly to your experience relative to crack. Approximately how many arrests since you were assigned to the narcotics unit have you made relative to the apprehension and confiscation of crack?

MR. STANLEY: Your Honor, I want to object. The basis of my objection is if this question were the only one alone getting into background, it wouldn't matter.

I believe where Mr. Bakeman is going -- in his response he indicated that crack cocaine is a problem in Cleveland and few officers know. And based upon that, their experience

with crack, they have come up with so sort of profile on their own experience.

The question becomes is there probable cause or was there reasonable suspicion in this case and whether or not he arrested 25 people from Detroit with crack has nothing to do in my opinion with whether or not there's probable cause or reasonable suspicion in this case.

THE COURT: Thank you. Overruled.

BY MR. BAKEMAN:

Q. Thank you, your Honor. Approximately how many arrests have you made relative to the confiscation of crack and the apprehension of individuals involved in the distribution of crack?
A. Since I've been in the narcotics unit?
Q. Correct.
A. Approximately 3 or 400.
Q. Now, let's say from January of 1988 approximately how many people have you arrested relative to crack who gave addresses from the greater Detroit, Michigan area?

MR. STANLEY: Judge, may I have a continuing objection? Thank you.

THE COURT: Certainly.

A. Approximately 150.
Q. Now, have you also executed search warrants at crack houses?

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(Effective 1791)

APPENDIX D

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

(As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.)

APPENDIX E

21 U.S.C.

§ 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845, 845a, or 845b of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substance[1] referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 845, 845a, or 845b of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. For purposes of this subparagraph, the term "felony drug offense" means an offense that is a felony under any provision of this subchapter or any other Federal law that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

ORIGINAL

No. 90-6835

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

TERRENCE A. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

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QUESTIONS PRESENTED

1. Whether two police officers possessed reasonable suspicion to suspect that petitioner and his companion were drug couriers at the time the officers asked petitioner and his companion to stop.

2. Whether the court of appeals correctly applied the clearly erroneous standard of review in upholding the district court's determination that petitioner's arrest was supported by probable cause.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unreported, but the judgment is noted at 916 F.2d 714 (Table). The opinion of the district court denying the motion to suppress (Pet. App. 1c-12c) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1990. The petition for a writ of certiorari was filed on January 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on one count of possession of cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 120 months' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed (Pet. App. 1a-8a).

1. The evidence is summarized in the opinion of the court of appeals and in the order of the district court denying petitioner's motion to suppress. On April 17, 1989, two Cleveland police detectives were conducting surveillance at the Greyhound bus station. They watched as the 8:15 p.m. bus arrived from Detroit and about 20 to 30 people disembarked, including petitioner and two other young men. Pet. App. 3a, 1c-2c. Based on their experience, the detectives knew that drug couriers often use the bus from Detroit to Cleveland and that they arrive primarily on the last three buses from Detroit, including the 8:15 p.m. bus. Couriers are generally young, are not usually met in the bus station by anyone appearing to be a friend or relation, and they seldom carry any luggage. They usually meet someone outside the terminal in a waiting car or taxi. Id. at 3a, 2c-3c.

The detectives noticed that the three young men they saw leaving the 8:15 bus were not greeted by anyone, and that two of the three men had no luggage while the third man carried only a small gym bag. The officers watched the three men leave the station. The man carrying the gym bag walked away, while

petitioner and the other man stopped at a car parked outside the bus station in which two people were seated. After petitioner and the other man noticed the officers watching them, they left the car and continued walking down the street. The officers followed the two men, who continually looked over their shoulders at the officers. When the two young men started running, the officers shouted at them to stop and identified themselves as police officers. Pet. App. 3a, 3c-4c.

The two men did not respond to the officers' request to stop, but instead separated. The detectives also split up and each one pursued one of the fleeing men. As he started running, petitioner's companion "took a plastic bag out of his pocket, which appeared to contain crack cocaine, and tore it open with his teeth in an effort to dissipate the contents." Pet. App. 3a. Petitioner was apprehended and arrested, but his companion was not. Id. at 3a, 4c.

At the police station, a bag containing 88.63 grams of crack was found in petitioner's pocket. Petitioner admitted that he had come from Detroit to Cleveland to sell the crack. Pet. App. 3a-4a, 5c.

2. The district court denied petitioner's motion to suppress. The court found that "the flight in response to the request" to stop, coupled with the other factors that made the officers suspicious, "provided the detectives with reasonable suspicion to make a Terry stop." Pet. App. 10c. That reasonable suspicion, the court added, "rip[]ened into probable cause to make a

warrantless arrest when the officers witnessed the traveling companion's attempt to destroy the cocaine." Id. at 11c.

3. The court of appeals affirmed. It first concluded that the police had reasonable suspicion to stop petitioner and his companion before they started to chase them: "The police knew from past experience that Detroit was a source city and that drug couriers frequently travelled by bus between Detroit and Cleveland. They further knew that the couriers, more often than not, were young black males who arrived without luggage and were not met by anyone. This, coupled with the fact that the defendant and his companion were alert to surveillance and immediately fled when plainclothes officers approached, provided sufficient reasonable suspicion to make a Terry stop." Pet. App. 7a.

The court went on to find that the officers had probable cause to arrest petitioner at the time that they apprehended him. In making that determination, the court noted that it had "previously held that '[t]he district court's determination that probable cause existed to . . . arrest . . . must be accepted unless it is clearly erroneous.' United States v. Pepple, 707 F.2d 261, 263 (6th Cir. 1983) (citations omitted)." Pet. App. 7a. The court said that it viewed "the issue as a close one," but could not "say the conclusion of the district court was clearly erroneous." Ibid.

ARGUMENT

1. Petitioner first contends (Pet. 4-5) that this case presents the question left unanswered in Michigan v. Chesternut, 486 U.S. 567 (1988) -- whether a seizure occurs when police

officers command someone to halt and then pursue him, even though the person has not been physically restrained. In Chesternut this Court held that police officers did not seize a suspect by pursuing him in a car without commanding him to halt or turning on the car's siren. Id. at 574-576. The Court left "to another day the determination of the circumstances in which police pursuit could amount to a seizure under the Fourth Amendment." Id. at 575-576 n.9. That question is presented in a case now pending before the Court, California v. Hodari D., No. 89-1632 (argued Jan. 14, 1991), where the issue is whether a police officer's pursuit of a suspect, who fled at the sight of the officer and discarded some illegal drugs while fleeing, constituted a "seizure" before the suspect was apprehended.

This case does not present the question left unanswered in Chesternut. The court of appeals specifically stated that "[n]ot unlike the Supreme Court in Chesternut, we elect to decide only the case before us." Pet. App. 6a. It went on to hold that "we need not consider the implication of the command to stop and the subsequent pursuit" because the officers had reasonable suspicion to stop petitioner before that point. Id. at 7a. The court of appeals correctly reached that conclusion. Before the officers yelled "stop" and started chasing petitioner and his companion, they knew that the young men had arrived from a source city on a late bus on which drug couriers frequently traveled; that they had no luggage and were not met by anyone in the station; and that they approached a car outside the station, were alert to surveillance,

and walked away from the car when they spotted the officers. At that point, the officers reasonably suspected that petitioner and his companion were drug couriers. Thus, whether petitioner was seized when the officers told him to stop and started running after him is not relevant to the correct determination of this case, since the officers were justified in stopping petitioner at that point. Accordingly, there is no reason to consider the first question presented by petitioner or to hold this case for consideration in light of Hodari D.

2. Petitioner also argues (Pet. 5-7) that the court of appeals erred by applying the "clearly erroneous" standard to the district court's determination that the officers had probable cause to arrest petitioner when he was apprehended. We agree with petitioner that a district court's conclusion that certain facts amount to probable cause is subject to de novo review, but we do not believe that this case is an appropriate one for review by this Court.

The question whether an arrest is supported by probable cause is a mixed question of law and fact, that is, a question "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982). Thus, a district court's findings of "historical facts" may be reversed on appeal only where they are found to be "clearly erroneous."

See, e.g., Maine v. Taylor, 477 U.S. 131, 145 (1986). But the review of the district court's application of the legal standard of probable cause to those facts resolves a question of law and on that issue appellate review is not similarly circumscribed. Cf. Ker v. California, 374 U.S. 23, 33-34 (1963) (reasonableness of a search); Miller v. Fenton, 474 U.S. 104, 110, 117 (1985) (voluntariness of a confession).

Several circuits have held that whether particular facts constitute probable cause is a legal issue subject to de novo review by the courts of appeals. See United States v. Patrick, 899 F.2d 169, 171 (2d Cir. 1990); United States v. Hoyos, 892 F.2d 1387, 1392 (9th Cir. 1989), cert. denied, 111 S. Ct. 80 (1990); United States v. Patino, 862 F.2d 128, 132 (7th Cir. 1988), cert. denied, 490 U.S. 1069 (1989); United States v. Thomas, 835 F.2d 219, 222 (9th Cir. 1987); United States v. Lima, 819 F.2d 687 (7th Cir. 1987); United States v. Alfonso, 759 F.2d 728, 741 (9th Cir. 1985); United States v. McKinney, 758 F.2d 1036, 1042 (5th Cir. 1985); United States v. Freeman, 685 F.2d 942, 948 (5th Cir. 1982). The Sixth Circuit's contrary conclusion in this and in two other cases, United States v. Pepple, 707 F.2d 261, 263 (6th Cir. 1983), and United States v. Sangineto-Miranda, 859 F.2d 1501, 1508 (6th Cir. 1988), is, we believe, incorrect.[1]

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[1] The Fourth and Eighth Circuits have not clearly adopted either standard of review. In one Fourth Circuit decision, that court reviewed factual determinations under the clearly erroneous test while stating that whether the facts established reasonable suspicion is subject to de novo review. United States v. Gooding, 695 F.2d 78, 82 (1982). But in a subsequent decision, that court stated that the probable cause determination is subject to review

However, we do not believe that review by this Court is warranted. As an initial matter, petitioner did not argue in the court of appeals that the court should review the probable cause finding de novo. Nor did petitioner ask the en banc court to consider the issue. The court of appeals therefore did not reconsider its prior determination that the clearly erroneous standard applied, but merely followed its decision in Pepple. It may be that the Sixth Circuit will reconsider its position if asked to do so in light of the weight of authority supporting the application of the de novo standard.

In addition, review is not warranted because, in our view, the result in this case would be the same under the de novo standard. By the time petitioner was apprehended, the officers not only knew the facts that gave rise to their reasonable suspicion, but also had observed petitioner and his companion flee and refuse to halt

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under the clearly erroneous standard. United States v. Porter, 738 F.2d 622, 624 (1984). The Eighth Circuit also has adopted inconsistent positions on this issue in different cases. On some occasions, that court has stated that a "district court's finding of probable cause for the warrantless arrest of [the defendant] must be upheld unless clearly erroneous." United States v. Wentz, 686 F.2d 652, 656-657 (1982); see United States v. Simpkins, 914 F.2d 1054, 1057 (1990); United States v. Martin, 833 F.2d 752, 754 (1987), cert. denied, 110 S. Ct. 1793 (1990); United States v. Woolbright, 831 F.2d 1390, 1393 (1987); United States v. Love, 815 F.2d 53, 54 (1987), cert. denied, 484 U.S. 861 (1987); United States v. Everroad, 704 F.2d 403, 405 (1983). In other cases, however, the Eighth Circuit has suggested that it reviews a district court's findings of fact for clear error, but undertakes de novo review of the district court's conclusions of law, including its application of the legal standard to the facts. See United States v. Campbell, 843 F.2d 1089, 1092 (1988); United States v. Reiner Ramos, 818 F.2d 1392, 1394 (1987); United States v. Reivich, 793 F.2d 957, 961 (1986); United States v. McGlynn, 671 F.2d 1140, 1143 (1982).

in response to the officers' command. Moreover, the officers saw petitioner's companion tear a plastic bag open while he was fleeing and attempt to discard a substance that appeared to be crack cocaine. Petitioner states that "[m]erely being in the presence of one who commits a crime, even knowing that it is being committed, is not sufficient to charge the observer as a principal." Pet. 7. But petitioner was more than a mere observer, and there was probable cause to arrest him as well as the other man. The police had watched the two men get off the bus together, walk to the car together, walk down the street together, and then flee from the officers at the same time. When one of the two tried to rid himself, while he was fleeing, of a substance that appeared to be crack cocaine, the officers had an adequate basis to believe that both petitioner and his companion were acting in concert to transport and distribute cocaine. See United States v. Patrick, supra, 899 F.2d at 171-172.[2] Thus, under any standard of review the lower courts' conclusion that petitioner's arrest was justified by probable cause was correct.

Furthermore, this is not an appropriate case in which to address the conflict in the circuits because neither party would defend the court of appeals' application of the clearly erroneous standard. We previously acquiesced in the petition for a writ of certiorari in No. 88-6448, Baron v. United States. In that case,

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[2] As this Court has observed, probable cause deals not with certainties, but with probabilities judged according to practical and common sense standards and based on the totality of the circumstances. See United States v. Sokolow, 109 S. Ct. 1581, 1585 (1989); Illinois v. Gates, 462 U.S. 213, 231-232 (1983).

the district court found that the police lacked probable cause to arrest the defendant but the Ninth Circuit, applying the de novo standard, reached the opposite conclusion. Although we stated that the Ninth Circuit correctly had applied the de novo standard, we agreed that review was warranted in light of the conficting decisions of the Sixth Circuit.[3] But this Court denied the petition in Baron. 490 U.S. 1040 (1989). Although resolution of the conflict will be warranted if the Sixth Circuit continues to apply the clearly erroneous standard, if the conflict persists this Court should decide the issue in a case in which the parties will make opposing arguments on the legal issue presented. Thus, the Court should wait for another case like Baron where the defendant argues in favor of the application of the clearly erroneous standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

MARCH 1991

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[3] Despite our position in Baron, the United States Attorney, relying on Sixth Circuit precedent, noted in his brief in this case that the district court's finding of probable cause was subject to review under the clearly erroneous standard. Gov't C.A. Br. 12.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

TERRENCE A. WILLIAMS PETITIONER	)	
V	)	NO. 90-6835
UNITED STATES OF AMERICA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE UNITED STATES IN OPPOSITION by mail on March 21, 1991.

M. KATHRYN CROFT
500 SOCIETY BUILDING
AKRON, OH 44308

Kenneth W. Starr
KENNETH W. STARR
Solicitor General

March 21, 1991

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SUPREME COURT OF THE UNITED STATES

TERRENCE WILLIAMS *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 90–6835. Decided April 29, 1991

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of the position presently asserted by the Solicitor General in his brief for the United States filed March 21, 1991.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

I adhere to the view that we should not vacate a court of appeals' judgment favoring the Government when the Solicitor General disagrees with the reasoning of the court of appeals but defends its result. See *Diaz-Albertini* v. *United States*, 498 U. S. ——, —— (1991) (REHNQUIST, C. J., dissenting); *Alvarado* v. *United States*, 497 U. S. ——, —— – —— (1990) (REHNQUIST, C. J., dissenting). That is the position the Government again takes in the case before us, and I dissent from the order granting certiorari, vacating the judgment, and remanding the case.